SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 1081.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, PETITIONER,

vs.

ALFRED H. SMITH.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

To the Honorable the Supreme Court of the United States:

Your petitioner, Philadelphia, Baltimore and Washington Railroad Company, is a corporation, organized and existing under the laws, among others, of the States of Pennsylvania and Maryland, and is now and at the time of the occurrence and proceedings hereinafter recited was engaged in the business, both interstate and intrastate, of

a common carrier by railroad, and as such was at all times subject, in so far as immediately applicable in the circumstances, to the laws both of the United States and of the respective States above mentioned.

Respondent Alfred H. Smith, an employee of petitioner, brought action in the Circuit Court of Caroline County, State of Maryland, to recover under the provisions of the Federal Employers' Liability Act of April 22, 1908, as amended April 5, 1910, to recover damages for personal injuries suffered by him under the following circumstances:

Respondent (plaintiff below), as averred in count one (all other counts having been stricken out prior to verdict, R., 2) of his declaration, "was employed as cook *for other employees* of the defendant (petitioner here) *engaged in interstate commerce* (chiefly bridge carpenters engaged in building and repairing bridges of the defendant in different States, over which the defendant ran its cars engaged in interstate commerce), his duties requiring him to go back and forth between the States as employment of the aforesaid employees of the defendant, for whom he cooked, required; * * * that the work assigned to him principally was to take care of the aforesaid car (a so-called camp car), in which he and the other employees of the defendant ate and slept, to keep it clean, to make the beds, to buy the food, prepare and cook it" (R., 3); that on the day of the accident and consequent injuries to him the camp car in which he and the bridge carpenters mentioned

were quartered "was located on the side-track in the town of Easton, Maryland," and "*certain agents and employees of the defendant engaged in interstate commerce,* negligently and carelessly ran an *engine of the defendant engaged in interstate commerce* with great force into the said cars, throwing the plaintiff, who was cooking dinner for himself and the other employees of the defendant as aforesaid, some ten feet against a door casing and partition," greatly injuring him (R., 4), to his damage, as claimed, in the sum of $15,000 (R., 8). (Italics supplied.) To this count your petitioner demurred, and to the overruling of the demurrer duly noted exception (R., 9).

On the trial plaintiff Smith testified that he "was to do the cooking, clean the car, make the beds, and do anything my (his) boss asked me (him) to do" (R., 15). At the time in question the men who occupied the car, bridge carpenters, "were making a cement abutment on the iron bridge" below Easton, over which bridge freight trains and passenger trains ran from Clayton, Delaware, to Oxford, Maryland (R., 26). At the time of the accident the camp car had been lying on the siding "about three weeks" (R., 19); the damage was caused by "a freight" train (R., 17) which customarily passed the camp car while so located "twice a day, once up and once down" (R., 19).

On behalf of plaintiff it was further testified that the food for the bridge gang was not provided by your petitioner, but was purchased by plaintiff

Smith for account of himself and associates: "we kept an account of the meals and at the end of the month we divided the meals with the amount of money spent. Each man paid his board" (R., 35).

After the accident the camp car and bridge gang remained at Easton "several weeks" (R., 41). "We were there, I think, three weeks" (R., 43).

On behalf of your petitioner it was testified that plaintiff was employed as a "carpenter laborer" "a man unskilled in carpentering" * * *. We place them on the roll as carpenter laborers. That means they work with the carpenters. The carpenters in this gang worked on bridges "over which trains run between the States of Maryland and Delaware" (R., 71).

At the conclusion of all testimony the learned trial court, over the objection of your petitioner, charged the jury that if they should find—

> "that on the said 23rd day of December, 1915, the defendant was a common carrier by railroad engaged in carrying freight and passengers between the States of Maryland and Delaware, and further find that on the said twenty-third day of December, 1915, the plaintiff, Alfred H. Smith, was employed by the said defendant railroad company to take care of a car in which he and certain bridge carpenters ate, slept and lived, and to keep the car clean, make the beds, buy the food, prepare and cook it; and further find that the said bridge carpenters were employed by the defendant to build and repair bridges in the States of Maryland and Delaware, over which bridges ran the trains of

the defendant engaged as aforesaid in carrying passengers and freight between the said States of Maryland and Delaware; and further find that the said bridge carpenters and the plaintiff had a common boss under whose directions the plaintiff performed his duties, and further find that the said car went back and forth between the States of Maryland and Delaware as the work of the said bridge carpenters required, and further find that on the aforesaid twenty-third day of December, 1915, the aforesaid car of the defendant was located on the side-track at the town of Easton, Maryland, where it had been placed by the agents of the defendant and was coupled at each end to a car of the defendant, and further find that the said bridge carpenters were then engaged in repairing bridge abutments below Easton over which ran the trains of the defendant engaged as aforesaid in carrying passengers and freight between the said States of Maryland and Delaware, and further find that a locomotive engineer employed by the defendant and engaged in running an engine which transported freight between the States of Maryland and Delaware, negligently ran the said engine into the said car and injured the plaintiff, and further find that at the time of said injury the said plaintiff was in the car assigned to him by the defendant and was in the performance of his duties and exercising due care, then the verdict of the jury must be for the plaintiff."

To such charge your petitioner likewise duly excepted (R., 82). The jury returned its verdict in

favor of plaintiff for $4,000 and judgment was so entered (R., 2).

On appeal to the Court of Appeals of Maryland this judgment was affirmed, that learned court, after stating its appreciation of certain cited cases, including Shanks *vs.* Delaware & Lackawanna R. R. Co., 239 U. S., 556; Chicago, &c., R. R. Co. *vs.* Harrington, 241 U. S., 177, and Delaware, &c., R. R. Co. *vs.* Yurkonis, 238 U. S., 444, saying:

> * * * "The decisions referred to and relied on by the appellant rest upon the theory that the work in which the plaintiff was engaged was not so closely related to interstate commerce as to be practically a part of it, and are readily distinguished from the case at bar. Here the bridge carpenters were employed in repairing the bridges of the defendant, which were necessary for the maintenance of its road and the conduct of interstate commerce in which the defendant was then engaged. The work done by the plaintiff, and for which he was employed by the defendant, was in furtherance and in aid of the work performed by the carpenters. He was a member of the gang and subject to the control of the boss of the gang, and was performing his duties on the property of the defendant and in a car furnished by the defendant as one of the instrumentalities engaged in the maintenance of its road, and we think the case falls clearly within the reasoning and principle applied in Pederson *vs.* Del., Lac. & West. R. R. Co., 229 U. S., 146."

Having quoted at length from the opinion of this Court in Pederson's case, the learned court of appeals concluded its opinion as follows:

> * * * "If the plaintiff had, through the negligence of the defendant, sustained the injuries complained of while he and the other members of the gang were being transported in the camp car over the defendant's line from a point in Delaware to a point in Maryland to repair a bridge in the latter State, his right to recover under the Federal act could not have been questioned under the decisions referred to and many others that might be cited. How then can the fact that the camp car was temporarily located on a siding of the defendant in Maryland, while the carpenters were repairing a bridge there before being moved to some other point on the line, perhaps in Delaware, for the same purpose, alter the relations of the work in which the plaintiff and carpenters were, at the time of the injury, employed by the defendant in the repair of its road, which was essentially and directly related to the interstate commerce in which the defendant was engaged, and we see no good reason why the plaintiff under the circumstances should be denied the protection of the act relied on."

Your petitioner is advised that the learned Court of Appeals of the State of Maryland, in holding the case at bar to be ruled and controlled by the decision in Pederson's case (229 U. S., 146), committed error, in that it failed to give consideration or effect to the distinguishing fact that in that case the injured plaintiff, who "was an iron worker em-

ployed by the defendant (a carrier by railroad engaged in both interstate and intrastate commerce) in the alteration and repair of some of its bridges and tracks," and at the time of his injury "was carrying from a tool car to a bridge, known as the Duffield bridge (regularly used in both interstate and intrastate commerce), some bolts or rivets which were to be used * * * in repairing that bridge," while in the case at bar the plaintiff, though employed and paid by your petitioner and serving under a common boss with the bridge carpenters, had no part or place with them in the work of altering or repairing or building, as the case may have been, the bridge on your petitioner's interstate line between Clayton, Delaware, and Oxford, Maryland; nor was plaintiff at the time of the injury to him performing any work "so closely connected" with interstate commerce "as to be a part of it," for the work about which he was then engaged, that is cooking dinner for the carpenters who were engaged in repairing that bridge, specifically, basting a "big turkey" and "boiling water for the potatoes" was "work being done independently of (the) interstate commerce in which defendant was engaged," and its performance was "a matter of indifference so far as that commerce was concerned."

Your petitioner is further advised that the learned Court of Appeals of Maryland, as well as the Circuit Court for Caroline County, committed error in matter of Federal law of widespread and general importance in declining to uphold peti-

tioner's demurrer to count one of plaintiff's declaration, and in assuming for purpose of submitting the case to the verdict of the jury, that in the circumstances disclosed by the evidence and above outlined, plaintiff suffered the injuries of which he complained while he was employed by petitioner in interstate commerce, the fact being that at the time of injury, and for at least three weeks prior thereto, he was and had been acting and working as mess cook and camp cleaner or attendant for a gang of bridge carpenters, who were quartered for their own convenience in a camp car belonging to petitioner, which was not being moved in interstate commerce but was located and standing on a switch track in the neighborhood of the bridge upon which the carpenters were then and for three weeks prior thereto had been and for at least three weeks thereafter, were working. While the camp car and its equipment were the property of petitioner, they were not moving nor were they in any manner engaged in interstate commerce, while the food which plaintiff at the moment of the injury was engaged in cooking was the sole property of himself and the carpenters, and at least until consumed by the latter and by alimentary processes had become transmuted into physical energy, was without relation, either express or implied, to interstate commerce within the purview of said Federal Employers' Liability Act, and therefore the preparation and cooking of such food by plaintiff did not and should not have been held to constitute the employment of plaintiff in interstate commerce at the

time when the injuries complained of were inflicted upon him.

Petitioner respectfully prays that in the interest of uniformity as well as of certainty in the application of the provisions of the Federal Employers' Liability Act of 1908 in the numerous cases which have arisen and are likely in future to arise in circumstances and facts more or less analogous to those existing in the case at bar, a writ of certiorari, as authorized by section 251 of the Judicial Code Act of March 3, 1917, as amended by the act of September 6, 1916, be issued out of this Honorable Court to the Chief Justice and Associate Justices of the Court of Appeals of Maryland, commanding them to transmit to this Court, on or before a day to be specified therein, a full and true transcript of the record and all proceedings, including the judgment had in said court of appeals, in order that the same may be here reviewed, and such further orders and judgments may be entered herein as right and law and justice may require.

And petitioner will ever pray, &c., &c.

THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY,
By FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
Its Attorneys.

STACY B. LLOYD,
HENRY R. LEWIS,
Of Counsel.

BRIEF.

Construing and limiting the provisions and effect of the Federal Employers' Liability Act of 1908, with particular reference to whether an injured employee was engaged in interstate commerce at the time of the injury received, this Court had said (per Van Devanter, A. J.) that—

> "Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce. The act was so construed in Pederson *vs.* Delaware, Lackawanna & Western Railroad Co., 229 U. S., 146. It was there said (p. 150): 'There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce. Again (p. 152): 'The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?' And a like view is shown in other cases."
>
> Illinois Central R. Co. *vs.* Behrens, 233 U. S., 473.

Again in Erie R. Co. *vs.* Welsh, 242 U. S., 303, it was said (per Pitney, A. J.), that—

> "* * * * the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform

> a task in interstate commerce is not sufficient to bring the case within the act (Illinois Central R. R. Co. *vs.* Behrens, 233 U. S., 473, 478)."

and the plaintiff there, a yard conductor on an interstate railway, injured while alighting from a slowly moving freight engine for the purpose of reporting to the yardmaster's office for further orders, all previous orders having been executed, was held not to have been employed in interstate commerce so as to render applicable in the circumstances the act above referred to, although the orders which he would have received had he not been injured would have required him immediately to make up an interstate train.

There is no similarity in the duties which were being performed by the plaintiff below and the plaintiff Pederson (229 U. S., 146) when they received their respective injuries for which suits were brought.

Pedersen was himself a bridge carpenter, concerned generally about and with the repairs then being made to his employer's bridge which was then being used both in interstate and local commerce, and at the moment of injury was actually engaged in bringing up repair material for use of himself and associates in the performance of their immediate and current duties.

In the case at bar we have a similar bridge, similarly used for the movement of both interstate and local commerce, and similarly undergoing repair,

but Smith was not a bridge carpenter, was not engaged on or about the work being done on the bridge, and had no closer relation to interstate commerce than a dishwasher or a laundryman who was solely employed at a railway station eating house where meals are served or sheeted beds are furnished for the use of employees and travellers over the railroad, would have.

It is respectfully submitted that the error committed in the premises by the learned Court of Appeals of Maryland, if not shortly corrected, will likely influence the decisions of other State courts, and of the Federal district courts in the many cases and questions which are arising and will continue to arise and be litigated before them under the provisions of the Federal Employers' Liability Act of 1908, as amended, and therefore the question and matter presented in and by the annexed petition for certiorari is of such large and general importance as will fully justify the favorable exercise of the discretionary power of this Honorable Court as conferred by the provisions of the Judicial Code.

FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
Attorneys for Philadelphia, Baltimore & Washington R. R. Co., Petitioner.

STACY B. LLOYD,
HENRY R. LEWIS,
Of Counsel.

To T. ALAN GOLDSBOROUGH, ESQUIRE,
Attorney for Alfred M. Smith:

Please take notice that on Monday, October 7, 1918, at 12 o'clock noon, or so soon thereafter as counsel may be heard, we will submit to the Supreme Court of the United States for its consideration and action the beforegoing petition for writ of certiorari and brief in support thereof.

FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
Attorneys for P., B. & W.
R. R. Co., Petitioner.

Service of foregoing notice with copy of petition and brief referred to acknowledged this — day of ——, A. D. 1918.

Attorney for Alfred H. Smith,
Respondent.